



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 17, 2004

Mr. Brad Norton
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8845

OR2004-4020

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201863.

The City of Austin (the "city") received two requests from the same requestor for information related to any complaints or investigative reports regarding a named employee and all employees in the city's Solid Waste Services Department over a certain time period. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.108, 552.116, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children,

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Additionally, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and information relating to drug overdoses, *see* Open Records Decision No. 343 (1982). We have marked the information that is protected by common-law privacy and must be withheld under section 552.101 of the Government Code. We note, however, that the remaining information at issue consists of information regarding the employment of the individuals in question and, thus, is of legitimate concern to the public. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Therefore, this information is not confidential under common-law privacy, and it may not be withheld under section 552.101 of the Government Code on this basis.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A government body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the government body receives the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). This office has concluded that litigation was reasonably anticipated when a potential opposing party filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Open Records Decision No. 336 (1982). You state, and provide supporting

documentation, that a portion of the submitted information relates to pending EEOC complaint number 31CA4000028. After reviewing your arguments and the information at issue, we agree that you have established that litigation was reasonably anticipated when the city received this request for information. We also find that the information you have marked is related to the anticipated litigation for purposes of section 552.103(a).

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. We note that some of the documents you have marked under this exception have been provided to the opposing party. Therefore, you may not withhold this information under section 552.103 as it has been provided to the opposing party in the anticipated litigation. However, you may withhold the remaining information you have marked under section 552.103. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, you assert that a portion of the submitted information is subject to section 552.108 of the Government Code. Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Based on the information you provided, we agree that a portion of the information pertains to an investigation that concluded in a result other than conviction or deferred adjudication. Therefore, section 552.108(a)(2) is applicable to the information we have marked.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976) (listing basic information that must be released from offense report in accordance with *Houston Chronicle*). Thus, with the exception of the basic offense and arrest information, the city may withhold the information we have marked based on section 552.108. We note that you have the discretion to release all or part of the information at issue that is not otherwise confidential by law. Gov't Code § 552.007.

You also assert section 552.116 of the Government Code, which provides as follows:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from [public disclosure]. If information in an audit working paper is also

maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. A statute is defined as a law passed by a legislative body at the federal, state, county, or city level of government. *See* BLACK'S LAW DICTIONARY 1420 (7th ed. 1999), BLACK'S LAW DICTIONARY 1410 (6th ed. 1990). A municipal charter, which is "a legislative enactment conferring the governmental powers of the state upon its local agencies," falls under this definition of a "statute." *Id.* at 1017.

You assert that a portion of the submitted information concerns an audit that was conducted by the office of the city auditor. You inform us that section 17 of article VII of the Charter of the City of Austin establishes the office of the city auditor and imparts on it the "responsibility to conduct, or cause to be conducted, financial, performance, investigative, and other audits following government auditing standards as promulgated by the Comptroller General of the United States." You also inform us that the authority of the city auditor to conduct audits is further authorized by chapter 2-8 of the Austin City Code. Specifically, you assert section 2-8-2(G)(3) of the Austin City Code, which states that "[i]f the City Auditor determines that there is serious concern regarding fraud, abuse, or illegality . . . the City Auditor is authorized to initiate spontaneously and conduct, or expand the scope of, an audit." In this instance, we understand you to represent that the audit at issue was initiated by the office of the city auditor under the authority granted by chapter 2-8-2(G)(3) of the Austin City Code. Based on our review of your representations and the information at issue, we find you have sufficiently demonstrated that this information was prepared or maintained by the city's auditor in conducting an audit authorized or required by a statute of this state or the United States. *See* Gov't Code § 552.116(a), (b)(1), (b)(2). Accordingly, the city may withhold the information we have marked under section 552.116 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current

or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). For employees who timely elected to keep their personal information confidential, you must withhold this information under section 552.117(a)(1) of the Government Code. The city may not withhold this information under section 552.117(a)(1) for employees who did not make a timely election to keep the information confidential.

We note, however, that under section 552.023 of the Government Code a person or a person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. Therefore, the requestor has a special right of access to his section 552.117 information, and it must be released to him in this instance.

In summary, we conclude that: 1) the city must withhold the information we have marked under section 552.101 of the Government Code and common-law privacy; 2) with the exception of the documents that have been provided to the opposing party, the city may withhold the information you have marked under section 552.103 of the Government Code; 3) with the exception of the basic offense and arrest information, the city may withhold the information we have marked based on section 552.108 of the Government Code; 4) the city may withhold the information we have marked under section 552.116 of the Government Code; and 5) with the exception of the requestor's information, for employees who timely elected to keep their personal information confidential, you must withhold the section 552.117(a)(1) information. All remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/krl

Ref: ID# 201863

Enc: Submitted documents

c: Mr. Derrick L. Johnson
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(w/o enclosures)